Supreme Court of Illinois.

GREER v. YOUNG.

A., a citizen of Missouri, was sued in that state by B., also a citizen of Missouri, and, while the suit was pending, A., at the request of his attorneys, went to Illinois to assist them in taking the depositions of witnesses, and, while there for that purpose, was served with a summons in a suit instituted in that state by B. for the same cause of action: *Held*, that A. was not exempt from service.

Any defect in the writ, its service, or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion; but where the objection is founded upon extrinsic facts, as that the party was exempt from service, the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact.

ERROR to Appellate Court, First District.

Dent, Black & Cratty Bros., for plaintiff in error.

Clifford, Anthony & Paulson, for defendant in error.

The opinion of the court was delivered by

MULKEY, J.—Robert C. Greer, on the 23d of July, 1884, commenced an action of assumpsit in the superior court of Cook county against George Young. A summons in the usual form, returnable on the first Monday of the following month, was served on the defendant, and due return thereof made by the sheriff of Cook county on the same day. On the 4th of August 1884, the plaintiff filed in the cause a declaration in the usual form, containing the common counts only. On the 18th of the same month the defendant filed, by his attorneys, a special appearance in the case, "for the purpose only of moving to quash the writ of summons and dismiss the suit." On the 19th of the same month the defendant filed a written motion in the cause "to quash the service of the writ of summons," for the reason, as is alleged in the motion, "that the defendant is a non-resident of the state of Illinois, and, at the time of said service, was within the jurisdiction of this court for the purpose of attending legal proceedings, and for no other purpose." This motion was supported by an affidavit of the defendant, showing, in substance, that both the plaintiff and the defendant were residents of Missouri; that the plaintiff, prior to the commencement of the present suit, had brought an action against the defendant in the Circuit Court of La Fayette county, in the state of Missouri, "for the identical cause of action for which this suit

is brought," and that said former suit was still pending and undetermined in the state of Missouri; that, in defending said last-mentioned suit, it became necessary to take depositions in Chicago, and that, under the instructions of his attorneys, he went to Chicago for the sole purpose of assisting his said attorneys in taking said depositions; that shortly after the taking of the same, and while in the office of his attorneys consulting with them as to the probable effect of the depositions, the sheriff made service of the summons upon him in the present case.

Upon consideration of the facts set forth in the affidavit, the superior court sustained the motion to quash the service, and entered an order dismissing the suit, which was affirmed by the appellate court for the First District. The case is brought here by plaintiff in error on a certificate of the appellate court, and a reversal of the judgment of affirmance is asked on a number of grounds. It is first contended that, as the defence was of a dilatory character, it should have been made at the very earliest opportunity, which it is claimed was not done. Of the correctness of the rule of law suggested there can be no question, but whether the motion was made at the earliest opportunity is a question of fact that may be materially affected by the rules of the court where the action was pending, of which this court cannot take take judicial notice; and, as all presumptions are to be indulged in favor of the correctness of the rulings of that court, in the absence of anything to the contrary, we are not fully prepared to say that the motion was not made in time, though it must be confessed the objection is not without force. However this may be, we prefer to place our decision upon other grounds. The most important question in the case is whether the circumstances shown, even if properly pleaded in due time, warranted the court in setting aside the service of the process, and dismissing the suit. There is clearly no ground for the claim that the plaintiff or his counsel had any agency in inducing the defendant to leave Missouri, and go to Chicago, for the purpose of having process served on him in the latter place. In other words, it is not claimed, nor is there any ground for the claim, that service of process upon the defendant was obtained by any artifice, trick or fraud on the part of the plaintiff, his counsel, or any one else acting in his interest. The question then arises, can one who voluntarily leaves his own state, and comes to this, for the purpose of taking depositions before a notary, be lawfully served, by reading, with

civil process while here on such business? The fact that the plaintiff had sued the defendant in Missouri on the same cause of action we do not regard as having any bearing on the question, as it is the settled law in this state that the pendency of a suit in another state cannot be pleaded in abatement of a suit brought here on the same cause of action. *McJilton* v. *Love*, 13 Ill. 486; *Allen* v. *Watt*, 69 Id. 655. But, even where the pendency of a suit in a sister state can be made available as a defence at all, it must, by all the authorities, be formally pleaded in abatement, which was not done here. The right of the plaintiff, then, to sue the defendant here, was the same as that of any one else having a claim against him. The ruling of the court, therefore, must be rested entirely upon the privilege or immunity which the common law has, from a very early period, extended to parties and witnesses in a lawsuit while attending court, including going and coming. This rule, as found in all the text-books, and in most of the cases we have examined, is expressly limited to cases of *arrest* on civil process. 1 Tidd, (1st Amer. ed.) 174; 3 Bl. Com. 289, side p. 1; Greenl. Ev., §§ 316, 317; 2 Bouv. Dict. 284.

The rule as laid down in the above works is fully sustained by an almost unbroken current of authority, as is fully shown by the following cases: *Meekins* v. *Smith*, 1 H. Bl. 636; *Kinder* v. *Williams*, 4 Term R. 378; *Arding* v. *Flower*, 8 Id. 534; *Spence* v. *Stuart*, 3 East 89; *Moore* v. *Booth*, 3 Ves. 350; *Ex parte Hawkins*, 4 Id. 691; *Ex parte King*, 7 Id. 313; *Sidgier* v. *Birch*, 9 Id. 69; *Ex parte Jackson*, 15 Id. 117–120.

The above authorities are also valuable as throwing light upon the procedure or practice in cases of this kind. The arrest of a party to a suit by civil process being regarded as a breach of the defendant's privilege, the usual course was to appear in the cause in which the arrest was made, and procure a rule against the plaintiff and his attorney to show cause why the defendant should not be discharged out of custody by reason of his alleged privilege, upon his filing common bail. The rule to show cause was always supported by affidavit setting up the fact of the arrest, and attendant circumstances. On the hearing the rule, depending upon the proofs, was either made absolute or discharged. If the former, the defendant, upon filing common or nominal bail, was discharged. And, if he had given special bail, the bail-bond was ordered to be surrendered and cancelled. Nevertheless the defendant was in court,

and was bound to answer the action. While, as we have just seen, the exemption, by the general current of authority, applies only to arrests, yet in some of the states, notably in New York, it has been extended to cases of service by summons merely, particularly where the defendant is a non-resident. *Person* v. *Greer*, 66 N. Y. 124; *Matthews* v. *Tufts*, 87 Id. 568.

No sufficient reason is perceived for departing from the general current of authority on this subject merely because some two or three of the states have, through perhaps a spirit of comity more than anything else, seen proper to do so. The mere service of a summons upon a non-resident when in another state, for the purpose of taking depositions to be used in an action to which he is a party in his own state, imposes no greater hardship upon him than to be served with process out of his own state, when attending to any other kind of business. In either case he is usually afforded ample time to prepare his defence, if he has any. Parties thus circumstanced have no difficulty in getting a temporary postponement or continuance of the causes, when necessary to the attainment of justice, or to avert any serious loss or inconvenience. It is clear that such a case does not come within the reasons of the rule as laid down in the authorities above cited. But, outside of this consideration, it is essential that the party invoking the protection of the rule should come prepared to show that he is clearly within it. The rule, as well as the principle on which it is founded, is thus expressed by Tidd, *supra:* "The parties to a suit and their witnesses are, for the sake of public justice, protected from *arrest* in coming to, attending upon, and returning from the court; or, as it is usually termed, *eundo, morando, et redeundo.*" The term "court," within the meaning of the rule, has received a very liberal construction. Greenleaf, in section 317, above referred to, thus summarizes the result of the authorities on this subject: "This privilege is granted in all cases where the attendance of the party or witness is given in any matter pending before a lawful tribunal having jurisdiction of the cause. Thus it has been extended to a party attending on an arbitration under a rule of court, or on the execution of a writ of inquiry; to a bankrupt and witnesses attending before the commissioners on notice; and to a witness attending before a magistrate to give his deposition under an order of court." To the last instance given by the author may be added the case of a party or his witnesses appearing before a master to give or take testimony which

would fall within the same principle. Where a master, magistrate or other person takes evidence in a cause under an order of the court wherein the cause is pending, such officer or other person is the mere instrument of the court, and is subject to its orders. In legal effect, such evidence is taken before the court. But a notary public, when taking depositions in one state to be used in a suit pending in another, can in no sense be regarded as an instrument or agency of the court wherein such suit is pending. Neither the notary, nor any of the parties appearing before him, are answerable to the court for anything said or done while there, the whole matter being outside of its jurisdiction. Not so with a master, magistrate or other person taking evidence under an order of the court within its jurisdiction. In such case all parties appearing before him for such purpose, if wilfully guilty of any improper conduct, might summarily be attached, brought before the court, and punished as for a contempt in its presence.

In taking the depositions the notary performed purely ministerial functions. He could decide no questions, nor determine any matter affecting the rights of the parties to the suit, nor was he, as we have just seen, connected with any court or other tribunal having the power to do so. Hence he could in no sense, in the language of Greenleaf, be said to have "jurisdiction of the cause," and therefore he does not fall within the category of any of the tribunals contemplated by the rule in question. Looking at the action of the trial court from another point of view, we do not think it in harmony with the decisions of this court. The case was disposed of upon a simple motion to quash the service. The writ, the service and return, as they appear of record, were in strict conformity with law, but it was sought to assail the validity of the service on account of certain matters alleged to exist *dehors* the record, and set forth by way of affidavit. This we do not think can be done. Had the defendant been arrested, and it was desired to raise the question of privilege for the purpose of obtaining his discharge, then, in conformity with the well-settled practice in such cases, a rule *nisi* should have been taken against the plaintiff, as heretofore indicated, and the question would then properly have been heard on affidavit, as was done in this case. But no such a case as the one suggested was before the court. There was simply an attack upon the service founded upon extrinsic facts. Whatever may be the practice in states where the code system prevails, it is clear the

course pursued was not proper. Here the common-law practice prevails generally, except in so far as it has been modified by legislative enactment, or perhaps, in some instance, by long and uniform custom. But we are aware of no change in the practice by legislation or otherwise, so far as the procedure in cases of this kind is concerned. The rule, as recognised here in repeated decisions, and which is in strict accord with the common-law practice, is, that any defect in the writ, its service, or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion, but, where the objection is founded upon extrinsic facts, the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact. If the plaintiff is successful upon such issue, the judgment is *quod recuperet.* It is therefore to him a valuable right to have the issue thus made up and tried. To permit the defendant to try an issue of this kind on affidavit, as was done, gives him a decided advantage; for, if he fails, his motion would be simply overruled, and he would still have the right to a trial on the merits. To permit a party to thus speculate on the chance of succeeding on a purely technical ground without incurring any risk, and without any compensation to the plaintiff in case of failure, is contrary to the spirit of the common law, and is in direct conflict with the decisions of this court. *Holloway* v. *Freeman*, 22 Ill. 197; *McNab* v. *Bennett*, 66 Id. 157; *Union Nat. Bank* v. *First Nat. Bank*, 90 Id. 56; *Rubel* v. *Beaver Falls Cutlery Co.*, 22 Fed. Rep. 282; *Holton* v. *Daly*, 106 Ill. 131; *Hearsey* v. *Bradbury*, 9 Mass. 96; *Bean* v. *Parker*, 17 Id. 601; *Guild* v. *Richardson*, 6 Pick. 368; *Charlotte* v. *Webb*, 7 Vt. 48; *Lillard* v. *Lillard*, 5 B. Mon. 340.

For the reasons stated the judgments of the courts below are reversed, and the cause remanded to the Superior Court of Cook county for further proceedings in conformity with the views here expressed.

1. *Privilege of Members of Parliament.*—For a long time members of the English Parliament have been privileged from arrest on civil process during the sitting of that body. According to Selden the privilege is as ancient as the reign of Edward the Confessor: see *Bolton* v. *Martin*, 1 Dall. 296, for a statement of the origin and growth of the principle. The extent of the privilege has been a question concerning which different opinions have been entertained; and for a long time after its supposed origin but little can be found concerning it in either historical or legal works. In 24 Edw. IV., it was ruled that a menial servant of a member of Parliament, though privileged from arrest, might be

impleaded: stated in *Earl of Shaftbury's Case*, 1 Mod. 146. The earliest American case on the subject of privilege to legislators refused to recognise this case as an authority for the proposition that the privilege was limited at common law to arrest, and did not embrace exemption from the service of civil process: *Bolton* v. *Martin*, *supra*, Phila. Com. Pleas (1788). The court say: "Although it were fairly to be inferred from the case that the privilege of the servant was equal to the privilege of the member himself, yet a case determined at so early a period, when the rights and privileges of Parliament were so little ascertained and defined, cannot have the same weight as more modern authorities." From the language of the statute of 12 & 13 Wm. III., the court drew the inference that prior thereto members of Parliament were privileged from the service of process out of the courts of law during the sessions and for a reasonable time *eundo* and *reueundo*, as well as from arrest.

2. *Privilege to American Legislators.*—The case reported in Dallas arose before the adoption of the federal constitution. The defendant was a delegate to the Pennsylvania convention called to consider the proposed fundamental law of the coming republic, and while attending its sessions was served with summons. On the ground that he ought not to be diverted from the public business by lawsuits which might oblige him to attend them and go in pursuit of witnesses for his defence, the service was set aside. In *Anderson* v. *Rountree*, 1 Pin. (Wis.) 115, it is said that the exemption, as applied to legislators, is the privilege of the people and of the body, as well as of the individual members. See, to the same effect, *Doty* v. *Strong*, Id. 84. There are numerous statements in the cases to the effect that in England the privilege from arrest has always been construed to include the service of a summons: *Junean Bank* v. *McSpedan*, 5 Biss. 64; *Anderson* v. *Rountree*, 1 Pin. (Wis.) 115, citing 1 Bac. Abr. tit. *Privilege;* Tidd's Practice 257; Dunlap's Practice 92; *Holiday* v. *Pitt*, 2 Str. 985, 990. This position is usually assumed by the courts which have given a libera construction to the federal and state constitutions which provide in language nearly to the same effect that members of the legislative body of each shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same: *Gyer's Lessee* v. *Irwin*, 4 Dall. 107; *Anderson* v. *Rountree*, 1 Pin. (Wis.) 115; *Miner* v. *Markham*, 28 Fed. Rep. 387; *Doty* v. *Strong*, 1 Pin. (Wis.) 84; *Gibbes* v. *Mitchell*, 2 Bay 406; *King* v. *Coit*, 4 Day 129. In a few of the state constitutions exemption from civil process is also provided for. The privilege extends as well to territorial delegates to Congress as to senators and representatives, and includes exemptions from trial in actions where he who is entitled to it is a joint defendant: *Doty* v. *Strong; Gyer's Lessee* v. *Irwin*, *supra; Gibbes* v. *Mitchell*, 2 Bay 406. As to the last point, it is held otherwise in *Nones* v. *Edsall*, 1 Wall. C. C. 189. Though not expressly ruled, it is strongly intimated, that when a writ of arrest cannot be issued against the person because of privilege, his property cannot be attached upon original writ: *Hoppin* v. *Jenckes*, 8 R. I. 453, 458. Neither can he be served with a writ of error: *King* v. *Coit*, 4 Day 129.

3. *Extent of Privilege as to Time—English and American Rule.*—No time limit is prescribed during which, prior to the opening of the sessions or after their close, the privilege shall extend—the language is "and in going to and returning from the same." In England, the Court of Exchequer drew the conclusion from all that was to be found in the books on the subject "that whether the rule was originally for a convenient time, or for a time certain, the period of forty

days before and after the meeting of Parliament has, for about two centuries at least, been considered either a convevient time or the actual time to be allowed.'' The rule is the same whether there be a dissolution or a prorogation: *Goudy* v. *Duncombe*, 1 Ex. 430; *In re Anglo-French Co-Operative Society*, 14 Ch. Div. 533. It applies to one who was a member of the old, but not of the new, Parliament. The time is absolute without regard to the circumstances of a particular case: 14 Ch. Div. 533. The conclusion drawn by the Court of Exchequer and followed in the recent case in the court of Vice-Chancellor HALL is not accepted in this country as correctly declaring the result of the early English cases and the rules of Parliament. The question is fully discussed and the disclosures of the journals of Parliament stated, as well as the early English cases, in a very interesting manner by BRADLEY, C. J., and the conclusion is reached that the law of England, at the time of the adoption of the federal constitution, allowed only a reasonable or convenient time, and not a period of forty days after and before the assembling, dissolution or prorogation of Parliament: *Hoppin* v. *Jenckes*, 8 R. I. 453. See 1 Story Const., sect. 862; Cushing's Parl. Law, sect. 582. The construction put upon the constitution was that it meant a reasonable and convenient time for each member to go and return from the session of Congress. In an earlier case it was ruled that the "privilege is to be taken strictly, and is to be allowed only while the party is attending Congress, or is actually on his journey, going or returning from the seat of government:'' *Lewis* v. *Elmendorf*, 2 Johns. Cas. 222. The latest case on this subject approves the Rhode Island case, but goes very much further than it or the New York case. The defendant, a member of Congress from California, started from that state for Washington to attend the Congress which convened December 7th, in time to arrive in Milwaukee, Wisconsin, about October 21st. He was accompanied by his family, who remained in Milwaukee visiting while he was on a hunting expedition in northern Wisconsin, which continued for about ten days. Seven days after returning therefrom, and while in Milwaukee, service of state process was made upon him. It was shown that some of his family were too ill to travel for a short time during the stay in Milwaukee, and that the early departure from California was because of medical advice concerning the health of some of defendant's children. It was also made to appear that after remaining in Milwaukee two weeks, he might have arrived in Washington three weeks before the time fixed for the meeting of Congress, and that the usual route from California to Washington was not *via* Milwaukee. The state court refused, without prejudice, to set aside the service, and the cause was removed to the federal court, which did set it aside: *Miner* v. *Markham*, 28 Fed. Rep. 387. See *Coxe* v. *M'Clenachan*, 3 Dall. 478. The test applied is the good faith of the defendant; his purpose, primarily, in making the journey, must have been to be prepared to enter upon the discharge of his duties.

The only cases found which hold that legislators are not privileged from service of civil process by virtue of the constitutional immunity from arrest, were ruled in Texas and Kentucky: *Gentry* v. *Griffith*, 27 Tex. 461; *Catlett* v. *Morton*, 4 Litt. 122. See *dictum* in *Wilder* v. *Welsh*, 1 MacArthur (D. C.) 566. They are well reasoned and rest upon the ground that the language of the fundamental law is not broad enough to include such process.

4. *Privilege to Parties—Distinction as to Residents and Non-Residents.*—The extent of the privilege to parties to judicial proceedings is a question upon which different opinions have been held. In some courts a distinction has been taken between parties who are residents of the

jurisdiction and those who are not. Some of the earlier cases do not notice the distinction, and it is not always clear what the fact in this regard was. In Pennsylvania it was held that there was no distinction between writs of summons and *capias: Hayes* v. *Shields*, 2 Yeates 222 (1797); *Miles* v. *McCullough*, 1 Binn. 77 (1803); *Wetherill* v. *Seitzinger*, 1 Miles 237 (1836). The last two are cases in which the party served was a resident of the state, but not of the county in which service was made. See *Lyell* v. *Goodwin*, 4 McLean 29, holding that a judge privileged from arrest is privileged from service when about to set out on circuit. To the contrary: Id. 44. The current of early American authority was against this view in all actions in which bail was not required and where the parties were residents of the jurisdiction: *Hunter* v. *Cleveland*, 1 Brev. (S. C.) 167; *Sadler* v. *Ray*, 5 Rich. L. 523; *Hopkins* v. *Coburn*, 1 Wend. 292; *Page* v. *Randall*, 6 Cal. 32; *Blight* v. *Fisher*, 1 Pet. Ct. Ct. 41 (overruled by *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269, the opinion in the later case being concurred in by Justice TANEY and Judge GRIER); *Catlett* v. *Morton*, 4 Litt. 122. Some late cases are in accord with this principle: *Schlesinger* v. *Foxwell*, 1 N. Y. City Ct. 461; *Jenkins* v. *Smith*, 57 How. Pr. 171; *Case* v. *Rorabacher*, 15 Mich. 537; *Gentry* v. *Griffith*, 27 Tex. 461; *Wilder* v. *Welsh*, 1 MacArthur (D. C.) 566; *Massey* v. *Colville*, 45 N. J. L. 119; *Matthews* v. *Puffer*, 10 Fed. Rep. 606. The court say in the case cited from Michigan that cases may exist where a party to a suit may be entrapped into attendance for vexatious purposes, and where service of process may be an abuse to be relieved against. But any general exemption from service of process without arrest, merely because a party is attending court awaiting the trial of a cause, is unauthorized by any settled rule of law, and is not required by public policy. The Pennsylvania cases are not supported by any considerable reasoning. In *Hayes* v. *Shields*, it is said that the party's attention to his own business in the suit depending is distracted by other objects, and he is subjected to the inconvenience of attending an action at a considerable distance from his own place of abode, contrary to the wise indulgence of the law. In *Wetherill* v. *Seitzinger*, the court say that in England, and all the sister states, a party would not be privileged from the service of a summons. In New Jersey the court take the position that the service is not null, but will be set aside, or the venue arising therefrom changed, according to the circumstances of each case.

The proper ground upon which absolute exemption should be rested is that it is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors, while attending court, could be molested with process. Parties might be prevented from attending and delays might ensue or injustice be done. On this principle the distinction taken as to the extent of the immunity between residents and non-residents, as intimated in a late case (*Person* v. *Grier*, 66 N. Y. 124), would have but little or no foundation. But the rule established in New Jersey and Michigan would remove most of the reasons urged in favor of immunity to resident suitors.

The privilege is absolute when a party is brought into a jurisdiction, of which he is a non-resident to defend a suit: *Person* v. *Grier*, 66 N. Y. 124; *Matthews* v. *Tufts*, 87 Id. 568; *Nichols* v. *Horton*, 4 McCrary 567; *Massey* v. *Colville*, 45 N. J. L. 182; *Junean Bank* v. *McSpedan*, 5 Biss. 64; *Dungan* v. *Miller*, 37 N. J. L. 182; *Brooks* v. *Farwell*, 2 McCrary 220; *Sewing Machine Co.* v. *Wilson*, 22 Fed. Rep. 803; s. c. 51 Conn. 595; *In re Healey*, 53 Vt. 694; *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269; *Plimpton* v. *Winslow*, 9 Fed. Rep. 365; *Halsey* v. *Stewart*, 9 N. J. L. 366. But if a non-resident becomes a plaintiff, he

cannot avail himself of it: *Bishop* v. *Vose*, 27 Conn. 1. This distinction is recognised in *Sewing-Mach. Co.* v. *Wilson*, 22 Fed. Rep. 803; s. c. 51 Conn. 595; especially in jurisdictions where residents are not privileged. The privilege continues while the party is going to and returning from the trial: see *infra:* and applies to persons against whom actions have been brought in a representative capacity, regardless of the character of the defence which may be made: *Grafton* v. *Weeks*, 7 Daly 523; and a corporation officer: *Holmes* v. *Nelson*, 1 Phila. 217; and to one who is a party in interest, though the action is in the name of another: *In re Healey*, 53 Vt. 694.

5. *Privilege to Witnesses—Resident and Non-Resident.*—The extent of the privilege to resident witnesses is a question upon which the difference of opinion is the same as concerning its application to resident suitors. In New York resident witnesses are not exempt from service of process in actions in which bail is not required: *Morris* v. *Beach*, 2 Johns. 249; *Sanford* v. *Chase*, 3 Cow. 381; *Hopkins* v. *Coburn*, 1 Wend. 292; *Williams* v. *Bacon*, 10 Id. 636; *Bours* v. *Tuckerman*, 7 Johns. 538; *Jenkins* v. *Smith*, 57 How. 171; *Poard* v. *Rd.*, 7 Abb. Pr. (N. S.) 70; *Frisbie* v. *Young*, 11 Hun 474; see note 18. No reason is perceived why the courts which extend or deny immunity to a resident party should apply a different rule to a resident witness. On the ground that non-residents cannot be brought into court by process, and because of the preference of the law for oral testimony, non-resident witnesses are privileged from service of process while necessarily in attendance upon court and while going to and returning from the place of trial: *Sanford* v. *Chase*, 3 Cow. 381; *Seaver* v. *Robinson*, 3 Duer 622; *Merrill* v. *George*, 23 How. Pr. 331; *Person* v. *Grier*, 66 N. Y. 124; *Massey* v. *Colville*, 45 N. J. L. 119: *Smythe* v. *Banks*, 4 Dall. 329; *Grafton* v. *Weeks*, 7 Daly 523; *Person* v. *Pardee*, 6 Hun 477; *Brooks* v. *Farwell*, 4 Fed. Rep. 166; *Plimpton* v. *Winslow*, 9 Id. 365; *In re Healey*, 53 Vt. 694; *Atchison* v. *Morris*, 11 Biss. 191; *May* v. *Shumway*, 16 Gray 86; *Dungan* v. *Miller*, 37 N. J. L. 182; *Brett* v. *Brown*, 13 Abb. Pr. (N. S.) 295; *Mitchell* v. *Huron Circuit Judge*, 53 Mich. 541. A *subpœna* is not necessary to afford them protection: *Dungan* v. *Miller*, *supra*, overruling *Rogers* v. *Bullock*, 2 Penn. (N. J. L.) 516; *In re Healey*; *May* v. *Shumway; Brett* v. *Brown*, *supra ; Dixon* v. *Ely*, 4 Edw. Ch. 557. A witness does not lose his privilege as such because he is also a party: *Merrill* v. *George*, 23 How. Pr. 331; *Mackay* v. *Lewis*, 7 Hun 83; *Dungan* v. *Miller*, *supra*; and is entitled to the same immunity in a civil suit instituted by the United States as in a case where an individual is plaintiff: *United States* v. *Edme*, 9 S. & R. 147.

6. *Extent of the Privilege to Suitors and Witnesses.*—The privilege extends to witnesses and suitors in every case where attendance is a duty in conducting proceedings of a judicial nature. It is not confined to courts of record, but embraces all tribunals recognised by law as having power to pass upon the rights of persons; as attendance upon commissioners in bankruptcy: *Matthews* v. *Tufts*, 87 N. Y. 568; to the taking of a deposition under an order of court: *Holmes* v. *Nelson*, 1 Phila. 217; *U. S.* v. *Edme*, 9 S. & R. 147; or of a master in chancery: *Dungan* v. *Miller*, 37 N. J. L. 182; *Bridges* v. *Sheldon*, 7 Fed. Rep. 17; to taking a deposition under an informal stipulation: *Plimpton* v. *Winslow*, 9 Fed. Rep. 365; to attendance before a referee: *Clark* v. *Grant*, 2 Wend. 257; an examiner: *Huddeson* v. *Prizer*, 9 Phila. 65; before a register in bankruptcy under an order; *In re Kimball*, 2 Bene. 38, a case of arrest; before commissioners appointed to examine claims against a decedent's estate: *Wood* v. *Neale*, 5 Gray 538, a case of arrest; before a legislative committee to present a claim:

Thompson's Case, 122 Mass. 428, a case of arrest. One who goes at an appointed time with the *bona fide* intention of having a deposition taken, is protected, though he determine not to have it done: *Wetherill* v. *Seitzinger*, 1 Miles 237; and one returning from court which he had attended upon notice from his counsel to hear an argument: *Torry* v. *Bast*, 3 W. N. C. 63.

Defendants in criminal prosecutions instituted in good faith are not within the rule, even after being discharged on bail: *Moore* v. *Green*, 73 N. C. 394; or after acquittal: *Hare* v. *Hyde*, 16 Q. B. 394, 71 E. C. L. 373. Neither is a witness who is in attendance on court, when charged with an indictable offence: *Ex parte Levi*, 28 Fed. Rep. 651; nor one who is *bona fide* brought into the jurisdiction on a requisition as a fugitive from justice: *Williams* v. *Bacon*, 10 Wend. 636; *Adriance* v. *Lagrave*, 59 N. Y. 110. But if criminal process is used for the purpose of acquiring civil jurisdiction the courts will set the service aside: *Compton* v. *Wilder*, 40 Ohio St. 130; *Byler* v. *Jones*, 79 Mo. 261; *U. S.* v. *Bridgman*, 9 Biss. 221.

7. *Waiver of Privilege.*—Where parties or witnesses lay aside their character as such and for their own interest and benefit give cause for the commencement of actions against them, they waive their privilege to immunity, with the only conditions that the trial upon which they are in attendance must not be interfered with as the result of service: *Nichols* v. *Horton*, 4 McCrary 567. They lose it by remaining in the state an unnecessary length of time after the close of the trial they were interested in: *Van Liew* v. *Johnson*, stated in *Person* v. *Grier*, 66 N. Y. 124; *Shults* v. *Andrews*, 54 How. Pr. 380. In England the courts have given the privilege a large and liberal construction, as appears from the cases stated in Tidd's Prac., vol. 1, 196; as by waiting two days after the close of a hearing before a referee to learn the result: *Clark* v. *Grant*, 2 Wend. 257. After a witness is discharged from the obligation of his *subpœna*, he is subject to process if he remains and transacts business: *Smythe* v. *Banks*, 4 Dall. 329; or if, during an adjournment of the court, he leave its jurisdiction on business or pleasure: *Rex* v. *Piatt*, 3 W. N. C. 187.

A person who is privileged and is served with process must move promptly and set forth fully the facts which constitute his privilege, or he will waive it: *Matthews* v. *Puffer*, 10 Fed. Rep. 606; *King* v. *Phillips*, 70 Ga. 409; *Pollard* v. *Rd.*, 7 Abb. Pr. (N. S.) 70. A general appearance or any act equivalent thereto is a waiver: *Brett* v. *Brown*, 13 Abb. Pr. (N. S.) 295; *Williams* v. *McGrade*, 13 Minn. 174; as to give notice of retainer and demand a copy of the complaint: *Stewart* v. *Howard*, 15 Barb. 26; or to obtain a rule to show cause, where there is knowledge of the irregularity complained of: *Green* v. *Bonaffon*, 2 Miles 219; or to keep silent and exe cute an undertaking: *Farmer* v. *Robbins*, 47 How. Pr. 415; or to plead in bar: *Randall* v. *Crandall*, 6 Hill 342. It is not a waiver to give bail: *Mackay* v. *Lewis*, 7 Hun 83; *U. S.* v. *Edme*, 9 S. & R. 147; *Washburn* v. *Phelps*, 24 Vt. 506; *Larned* v. *Griffin*, 12 Fed. Rep. 590. But see *Stewart* v. *Howard*, 15 Barb. 26; *Farmer* v. *Robbins*, *supra*; nor to take steps to remove a cause to a federal court where a witness in attendance on such court has been served with process issued from a state court: *Atchison* v. *Morris*, 11 Biss. 191.

J. R. Berryman.

Madison, Wis.